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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-491

VERNON HENRY SCHNEIDER,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

Vernon Henry Schneider, your petitioner, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled cause on June 10, 1974.

OPINIONS BELOW

Petitioner and Edward Eugene Dace were jointly indicted for mail fraud in the United States District Court for the Eastern

District of Missouri, Eastern Division, and they pleaded guilty to three counts; they were sentenced by the Honorable James H. Meredith, District Judge. After sentencing, each defendant filed a motion under Rule 35 of the Federal Rules of Criminal Procedure seeking a reduction of their sentences, but the motions were denied. No opinions were written by Judge Meredith.

After the denial of his Rule 35 motion, petitioner duly appealed to the United States Court of Appeals for the Eighth Circuit, and his appeal was consolidated with a similar appeal in behalf of Mr. Dace, who was represented by separate counsel. The two causes were decided by a panel of the Court of Appeals on June 10, 1974. Circuit Judge Stephenson wrote the majority opinion, in which Circuit Judge Webster concurred. A dissenting opinion was filed by Circuit Judge Lay. The opinions have not yet been officially reported and are reproduced as Appendix A hereto.

On September 26, 1974, the Court of Appeals modified the opinion of June 10, 1974, but denied a petition for rehearing, Judge Lay dissenting. The order on rehearing has not yet been officially reported and is reproduced as Appendix C hereto.

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 10, 1974. (See Appendix B.) A timely petition for rehearing or for rehearing en banc was filed within the time as extended by the Court of Appeals. It was denied in the order on rehearing on September 26, 1974. (See Appendix C.)

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

The District Court, without stating any reasons therefor and without permitting petitioner or his counsel to inspect a presentence investigation report, sentenced petitioner on his plea of guilty to three counts of mail fraud, in violation of 18 U.S.C. Section 1341, to the maximum imprisonment for five years on each of two counts, to be served consecutively, and an additional five year period of probation on the third count. The questions presented are:

I

Whether such sentence was abusive, punitive, shocking, and illegal, as characterized by the dissent below, and excessive, cruel and inhuman, disparate, unconscionable, and contrary to the Fifth and Eighth Amendments to the Constitution of the United States, in view of such mitigating factors as the prior unblemished record of petitioner, restitution, disparity with other sentences, cooperation with law enforcement authorities, family background, war record, and job opportunities, thereby presenting the question of whether this Court should establish guidelines for sentencing by trial courts.

II

Whether the refusal to permit petitioner and his counsel to inspect the presentence investigation report, which apparently contained derogatory information, was abusive and illegal, in view of the heavy sentence and a routine policy of the District Court to deny defendants access to such reports, thereby presenting the question of whether this Court should establish guidelines for disclosure of such reports.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT INVOLVED

Constitution of the United States

Fifth Amendment

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation.

Eighth Amendment

Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Statutes of the United States

Title 18, United States Code

§ 1341. Frauds and swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other ar-

ticle, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Federal Rules of Criminal Procedure

Rule 32. Sentence and Judgment

(c) **Presentence Investigation.**

(1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) *Report.* The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of defendant, and such other information as may be required by the court. The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his

counsel to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

Rule 35. Correction or Reduction of Sentence

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

STATEMENT

Petitioner Vernon Henry Schneider was indicted in a 26 count mail fraud indictment filed on March 14, 1973, in the United States District Court for the Eastern District of Missouri, Eastern Division, Honorable James H. Meredith, District Judge. Petitioner was named in seven counts and his co-defendant, Edward Eugene Dace, was named in 24 counts; they were jointly charged in five counts. It was charged that the defendants, who were claims representatives for Hartford Insurance Group, participated in a scheme whereby they approved fraudulent insurance claims against Hartford and divided the proceeds.

On May 4, 1973, each defendant pleaded guilty to three counts, Dace as to Counts 6, 15 and 17, and petitioner as to Counts 6, 12 and 13.[1] On May 17, 1973, each defendant was sentenced by Judge Meredith to a total of 10 years imprisonment, to be followed by five years probation. The remaining counts as to both defendants were dismissed on motion of the government.

There were similar indictments against others at approximately the same time. District Court Case No. 72 Cr 170(2) was a six count mail fraud indictment against Paul Hugh Martin, Jeannine Stuart and John J. Kinealy, Jr. It was dismissed on motion of the government on July 2, 1973.

District Court Case No. 72 Cr 320(1) was a three count mail fraud indictment on December 14, 1972, against Paul Martin and John J. Kinealy, Jr. Martin pleaded guilty to two counts, and after study and evaluation under the provisions

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[1] For this Court's convenience we have reproduced as Appendix D hereto the three counts to which petitioner pleaded guilty.

of 18 U.S.C. § 4208(b) and 4208(c), he was sentenced by Judge Meredith to a term of one year imprisonment and $1,000.00 fine, the term of imprisonment to be served in a St. Louis County jail facility. The indictment as to Kinealy was dismissed.

District Court Case No. 72 Cr 321(4) was a three count mail fraud indictment against Paul Martin and Jeannine Stuart. The indictment as to Martin was dismissed on motion of the government. Stuart pleaded guilty to one count, and was sentenced by another District Judge to pay a fine of $1,000.00 and was placed on probation for three years.

Gary Minkin was charged in a one count mail fraud indictment. He was convicted in a jury trial and was sentenced by another District Judge to a term of three years imprisonment, with six months thereof to be served in a jail type institution and the balance on probation. His conviction was affirmed on appeal on September 27, 1974. See *United States v. Minkin*, — F. 2d —, 8th Cir. No. 74-1004.

The general nature of all of these indictments involved similar schemes of filing false insurance claims and the use of the mails to process the fraudulent claims. In the counts involving Martin, Stuart and Kinealy, Aetna Insurance Company was the victim. Hartford Insurance Group was defrauded by petitioner, Dace and Minkin. Martin was also involved in the fraudulent scheme as to Hartford—see paragraph 5 of Appendix D hereto—but he was not indicted as to any Hartford claim, presumably because he had already pleaded guilty as to the Aetna frauds by the time of the indictment of Dace and petitioner.

On May 4, 1973, petitioner entered a plea of guilty to three counts of the indictment; Counts 12 and 13 related to the same

fraudulent claim. (See Appendix D.) His plea of guilty was accepted and sentencing was set for May 17, 1973 (Tr. 6).[2]

Prior to the date of sentencing, petitioner's counsel requested an opportunity to examine his presentence investigation report, but the request was denied by Judge Meredith (Tr. 12). Petitioner and his counsel were given an opportunity to speak, and counsel pointed out that petitioner had never been in trouble before and had served as a volunteer police officer in the past (Tr. 8). He had been steadily employed, and had two children in college, one of whom was graduating pre-medical school. He had two separate tours of duty as a combat pilot, and was shot down on one occasion and had been decorated three times. He suffered a disability as a result of his war service (Tr. 8).

Petitioner, through his counsel, acknowledged his participation in the fraudulent scheme against his employer, Hartford Insurance Group. On those matters to which he pleaded guilty, it was pointed out that he had made full restitution to Hartford, even including repayment of those portions of the ill-gotten gain which had been received by his confederates (Tr. 8-9). In addition, it was explained that petitioner cooperated with and supplied information to the authorities in other investigations (Tr. 9). Counsel also indicated that petitioner had opportunities for employment and was well regarded by many people (Tr. 9), some of whom had submitted letters of recommendation to the probation office investigator.

The Court sentenced petitioner as follows (Tr. 10):

> "Mr. Schneider, on your plea of guilty, this Court sentences you to five years on count six and five years on

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[2] The transcript (Tr.) of the plea, sentencing and the hearing on petitioner's motion for reduction of sentence was filed in the Court of Appeals and should be included in the certified record which petitioner has requested the Clerk of the Court of Appeals to forward to this Court.

count 12 to run consecutively. On count 13, the Court will suspend the imposition of sentence and place you on probation for a period of five years to begin at the conclusion of the sentence on the first two counts."[3]

The remaining four counts against petitioner were thereupon dismissed on motion of the government (Tr. 10).

The Court permitted petitioner to remain at liberty on his existing bail until June 18, 1973 (Tr. 10), at which time he reported as directed to the United States Marshal to begin the service of his sentence. He is now confined at the United States Penitentiary at Leavenworth, Kansas, and, after spending 89 days in the maximum security prison there, he was transferred to the minimum security camp at Leavenworth. (See Appendix E hereto, which has been included at the request of petitioner.)

On August 22, 1973, petitioner filed a motion for reduction of his sentence, pursuant to the provisions of Rule 35 of the Federal Rules of Criminal Procedure. (See Appendix F hereto.) In addition to requesting the Court to reduce his sentence and to place him on probation, or in the alternative to reduce his sentence and sentence him under the provisions of 18 U.S.C. § 4208(a), petitioner renewed his request to examine the presentence investigation report pursuant to the provisions of Rule 32(c) (2) of the Federal Rules of Criminal Procedure.

On September 10, 1973, Judge Meredith conducted an oral hearing on the motion for reduction. Counsel again requested an opportunity to examine the presentence investigation report "because I sincerely believe, Your Honor, that there must have been some matters in there of which I was not aware and I suppose which the defendant was not aware, and we would have liked to have had an opportunity to have been able to have an-

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[3] Mr. Dace was given the same sentence as petitioner. It is not known whether Mr. Dace will file a petition for a writ of certiorari.

swered those matters which may have been erroneous" (Tr. 12). The District Judge did not respond.

Counsel pointed out the hardship which confinement had created on petitioner, including a loss of weight and other physical ailments (Tr. 12). Counsel again made reference to petitioner's splendid war record, his cooperation with law enforcement officials, his family situation, and the availability of employment (Tr. 12-13). Counsel also presented a letter from a Mr. Reeves who had offered employment to petitioner and who was available in court to answer any questions (Tr. 12-13). The District Judge declined to talk to Mr. Reeves (Tr. 15).

Counsel also reminded the Court that petitioner had made full restitution in excess of the amounts by which he had personally profited (Tr. 14). Counsel compared the case of petitioner with that of Martin, who had also been sentenced by the same District Judge, but to a term of one year (Tr. 14).

The District Judge made no comment and took the motion under advisement (Tr. 15). On the same day as the hearing, the motion for reduction of sentence was denied without any written opinion. Thereafter, on September 20, 1973, petitioner duly filed his notice of appeal to the United States Court of Appeals for the Eighth Circuit from the orders imposing sentence, denying his motion for reduction of sentence, and denying his requests to examine the presentence investigation report.

Petitioner and Mr. Dace filed separate appeals, but the causes were consolidated on appeal and argued jointly on January 16, 1974. On June 10, 1974, two members of a panel of the Court of Appeals affirmed the sentence. The opinion was written by Circuit Judge Stephenson, and concurred in by Circuit Judge Webster; a vigorous dissenting opinion was filed by Circuit Judge Lay. (See Appendix A.)

On September 26, 1974, the Court entered an order on rehearing denying a petition for rehearing, but modifying the original opinion slightly. Judge Lay dissented from the denial of rehearing for the reasons stated in his original dissent. (See Appendix C.)

This petition for a writ of certiorari seeks to review the judgment of the Court of Appeals affirming petitioner's sentence.

REASONS FOR GRANTING THE WRIT

Introduction

This Court has frequently been called upon to establish guidelines for lower courts in many important stages of the administration of criminal justice. Thus the Court has delineated requirements in such areas as the right to counsel, confessions, discovery, admissibility of evidence, prosecutorial conduct, trial and appellate procedure, and acceptance of pleas of guilty.

But in that portion of the criminal proceeding which is of most concern to every guilty defendant—the sentence—no definitive standards have yet been established by this Court to provide guidance to trial courts. Mr. Chief Justice Burger acknowledged this hiatus in his dissenting opinion in *Furman v. Georgia*, 408 U.S. 238, 402 (1972):

> "As a general matter, the evolution of penal concepts in this country has not been marked by great progress, nor have the results up to now been crowned with significant success. If anywhere in the whole spectrum of criminal justice fresh ideas deserve sober analysis, the sentencing and correctional area ranks high on the list."

As a result of this lack of progress and the absence of guidelines for sentencing, prisoners are confined without any understanding as to the basis for their sentence, and appellate courts are being petitioned with ever increasing frequency to review allegedly abusive punishments.

Because of the excessive sentence imposed on this petitioner, without any explanation of the factors considered by the sentencing court, this petition for a writ of certiorari presents an opportunity for the Court to establish reasonable and necessary guidelines for trial courts as to the sentencing process.

I

Unexplained Excessive Sentence

Circuit Judge Lay began his dissenting opinion herein by observing:

> "Today we uphold obviously abusive and punitive criminal sanctions. The sentences approved by this court shock the human conscience and by legal standards stun the judicial conscience as well. But perhaps more relevant here, they were imposed illegally."

Judge Lay then proceeded to develop his reasons for so characterizing petitioner's sentence. We will not lengthen this petition by otherwise quoting from Judge Lay's opinion or by citing or rearguing the authorities upon which he relied. A full reading of his opinion and the authorities cited is essential to an understanding of the reasons why certiorari should be granted as to this Question. Suffice it to say that his opinion demonstrates how the Court of Appeals has departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by the District Court as to call for

an exercise of this Court's power of supervision; his opinion also suggests the need for a decision by this Court as to standards of sentencing, an important question of federal law which has not been, but should be, settled by this Court. See Rule 19 of this Court.

The necessity for a decision by this Court is emphasized by recent publications concerning sentencing in the federal courts. See, for example, Zumwalt, *The Anarchy of Sentencing in the Federal Courts*, 57 Judicature 96 (1973); Mattina, *Sentencing: A Judge's Inherent Responsibility*, 57 Judicature 105 (1973) and Frankel, *Criminal Sentences—Law Without Order*, published by Hill and Wang 1973).

The majority opinion herein recognized "that in the general vernacular the sentences imposed may properly be characterized as heavy. The defendants will be required to serve a minimum of three and a third years before they will be eligible for parole." But the majority opinion cited no decision or other authority for its holding that there was no abuse of discretion in the "heavy" sentence imposed upon petitioner.

On the facts pertaining to petitioner, the sentence was grossly excessive. Petitioner had a war record equaled by few. He served his country on two separate occasions in periods and places of extreme hazard, in World War II and the Korean War. While flying a combat mission as a Navy dive bomber, he was shot down by enemy action. He received three decorations, including the Air Medal. (See copy of citation upon presentation of his second award of the Air Medal, attached hereto as Appendix G.)

Prior to the instant case, petitioner had never been involved in any criminal activity. As a matter of fact, he had been a volunteer assisting Illinois law enforcement authorities. He was well respected by them, and letters of support and recommenda-

tion were, according to petitioner's information,[4] sent to the probation authorities.

When the fraudulent scheme, of which petitioner was a minor part, became known to his employer, petitioner immediately acknowledged his participation, assisted the company in determining the scope of the fraudulent claims, and made restitution of money lost by the company. Although others shared in the fraudulent proceeds with him, petitioner made full restitution without contribution from his co-conspirators. After his plea of guilty, he fully cooperated with the postal authorities in their investigation of the matters relating to Hartford and in other investigations they were conducting.

Petitioner was proud of his family. Within a day or two of his sentencing, his son graduated college, hoping to enter medical school.[5] His daughter was also a college student. Petitioner was assured of employment if placed on probation. It is certain that he would never again run afoul of the law.

The severity of the sentence was a hardship on his family, including his wife whose health is poor and his elderly mother. And the effect of the sentence is keenly felt by petitioner himself. At his request, we have attached to this petition as Appendix E an unsolicited letter written by him on October 12, 1973, from the penitentiary at Leavenworth.

Unless there is something derogatory in the presentence investigation report (see Question II hereafter), we cannot explain the severity of the sentence imposed upon petitioner. Its excessiveness is even more pronounced when compared with

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[4] Whether they were in fact seen by or made available to the District Judge is not known by petitioner, for, as indicated in Question II of this petition, petitioner never saw the presentence investigation report.

[5] Because of petitioner's sentence, those plans were abandoned.

that of Mr. Martin, who was sentenced to a term of one year in a relatively new state institution at Gumbo on the outskirts of St. Louis—this despite his defrauding Hartford Insurance Group and Aetna Insurance Company in amounts far in excess of that with which petitioner was involved.[6] Although the details of the participation of Jeannine Stuart are not available from the court files, she obviously was involved, and she received a sentence of probation and a fine, without confinement. Gary Minkin's participation (along with Mr. Dace) is discussed in *United States v. Minkin*, — F. 2d — (8th Cir. No. 74-1004, decided September 27, 1974). He was sentenced to six months confinement, with probation thereafter.[7]

Neither the District Court nor the Court of Appeals mentioned any factors to cause a ten year sentence for petitioner. Perhaps such factors do exist, but we believe that at the time of sentencing petitioner was entitled to be informed of them. Perhaps erroneous information was considered; petitioner should have had an opportunity to correct any such errors. Compare *United States v. Tucker*, 404 U.S. 443 (1972). Petitioner's sentence was not justified by anything of record or known to him. As Judge Lay emphasized in his dissent, most of the modern teaching on the philosophy of sentencing condemns the excessiveness of this sentence. Cf. *United States v. McCoy*, 429 F. 2d 739, 742-744 (D.C. Cir. 1970).

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[6] The magnitude of the operations of Mr. Martin is reflected in the study and evaluation reports submitted to the District Court pursuant to 18 U.S.C. § 4208(b) by the authorities at the United States Medical Center in Springfield, Missouri. Interestingly, although petitioner and his counsel were denied the presentence investigation report as to petitioner, the evaluation report as to Mr. Martin was contained in his District Court file and was open to inspection by the general public, including strangers such as petitioner's counsel herein.

[7] Although sentencing courts should not penalize a defendant for demanding a trial, we must remind that petitioner pleaded guilty whereas Minkin was tried, convicted, and appealed to the Court of Appeals. Compare *United States v. Wiley*, 278 F.2d 500 (7th Cir. 1960).

We believe further that under the circumstances of this case, petitioner's sentence was cruel and unusual punishment violative of the Eighth Amendment. The constitutional prohibition against cruel and unusual punishment is not limited to capital punishments, but may be applied to corporal punishments and even to excessive imprisonment. Mr. Justice Blackmun observed in *Jackson v. Bishop*, 404 F. 2d 571, 579 (8th Cir. 1968), that the decisions of this Court provide "a flat recognition that the limits of the Eighth Amendment's proscription are not easily or exactly defined, and we also have clear indications that the applicable standards are flexible, that disproportion, both among punishments and between punishment and crime, is a factor to be considered, and that broad and idealistic concepts of dignity, civilized standards, humanity, and decency are useful and usable." See also *Weems v. United States*, 217 U.S. 349 (1910), and *Trop v. Dulles*, 356 U.S. 86, 101 (1958), stating that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Compare *Robinson v. California*, 370 U.S. 660 (1962).

Much of the historical analysis of the Eighth Amendment by individual members of this Court in *Furman v. Georgia*, 408 U.S. 238 (1972), could be applied with equal force to the grossly excessive sentence imposed upon petitioner. Even the concept of those *Furman* opinions based upon infrequency of use of capital punishment has applicability here in the light of the statistics cited by Judge Lay in his dissent—in 1971, less than 50% of convicted mail fraud defendants were sentenced to prison, and for these, the average sentence was 33.2 months; only 37 defendants out of a total of 496 were sentenced to five or more years.

The subject of sentencing is of particular concern today. Obviously courts are concerned—see Frankel, *Criminal Sentences—Law Without Order*. And because of current events,

the general public has become more aware of the variance in sentences; citizens debate whether former government officials should be sentenced to imprisonment or granted probation or pardons. Some of that discussion has even included this petitioner—see St. Louis Post-Dispatch, June 11, 1974, page 3A, and June 23, 1974, pages 1C and 3C. No valid theory for punishment can justify the disparity between petitioner's sentence to ten years plus probation for a crime, the maximum of which is five years, and those sentences of others in the St. Louis area involved in similar activities, and those of persons who formerly occupied positions of public trust and who engaged in conduct which would appear to be legally and morally more reprehensible than petitioner's crime.

Considering the facts of this case, the applicable law, and the opinions of respected authorities in the field of punishment, we respectfully submit that the sentence imposed on petitioner was excessive, cruel and inhuman, disparate, unconscionable and a result of an abuse of discretion. In addition to a reversal of this case, with directions for resentencing (or perhaps even a resentence by this Court under the authority of 28 U.S.C. § 2106), we believe that in this case this Court can establish guidelines for sentencing by district courts. At the very least, such guidelines should include requirements that presentence investigation reports should be available to the defendant (see Question II hereof), and that the sentencing court must state of record those factors considered or disregarded in imposing sentence. Such a declaration by the sentencing court would not only present a reviewable record to an appellate court but would, no doubt, obviate many appeals by defendants thus made aware of the reasons for their sentences.

Because of the importance of this issue in the administration of criminal justice, we respectfully suggest that certiorari should be granted as to this Question.

II

Presentence Investigation Report

After petitioner's plea of guilty and prior to sentencing, his counsel, aware that disclosure of the contents of a presentence investigation report is discretionary under Rule 32(c)(2) of the Federal Rules of Criminal Procedure, requested that it be shown to him. The District Judge refused to do so (Tr. 12). The request was renewed in the motion for reduction of sentence (see paragraph 7 of Appendix F) and at the oral hearing on the motion (Tr. 12), but the request was again not granted.

In view of the heavy sentence imposed on petitioner, as compared with those of Martin, Stuart and Minkin in related cases, we can only conclude that there must have been derogatory information in the presentence investigation report. Petitioner was never given an opportunity to know the nature of such allegations against him or to present evidence to refute the charges.

In the circumstances of this case, we believe the District Court abused its discretion in keeping the report secret. The abuse of discretion is shown by the severity of the sentence—ten years imprisonment plus probation for a crime which carries a maximum of five years imprisonment.[8] An abuse of discretion is further demonstrated by the previous unblemished record of petitioner, his plea of guilty, his cooperation with the authorities, restitution to his employer, assurance of further employment—all of which are factors which ordinarily suggest probation as an appropriate form of punishment.

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[8] There is serious question whether petitioner committed only one crime, the defrauding of his employer, or whether there could be a splitting of the crime into separate counts charging separate fraudulent claims. In this instance, two of the counts to which petitioner pleaded guilty (Counts 12 and 13) related to the same fraudulent claim.

Furthermore, we believe an abuse of discretion exists in the fact that presentence investigation reports are routinely denied to defendants and their counsel in the Eastern District of Missouri. Compare *United States v. Brown*, 470 F. 2d 285, 288 (2nd Cir. 1972). At footnote 2 in the majority opinion, the Court of Appeals stated that petitioner did not establish that Judge Meredith had such a routine policy. Just how petitioner was expected to prove this policy was unclear. Judge Meredith did not make any statements as he had done concerning his "mechanical" sentencing policy which was condemned in *Woosley v. United States*, 478 F. 2d 139 (8th Cir. 1973).[9] Petitioner could not depose the judge or otherwise require him to substantiate the existence of the policy. However, counsel for petitioner did discuss this matter with numerous St. Louis attorneys who frequently defend criminal cases and with some courthouse personnel in position to know the procedure. No one could recall a case in which Judge Meredith ever permitted defense counsel to see a presentence investigation report.

The government certainly did not disprove petitioner's assertion of the routine policy. The only comment by the government was a statement in their brief in the Court of Appeals (p. 9): "This Government attorney has personally seen Judge Meredith verify from a pre-sentence report the truth or falsity of a felony conviction of a defendant at the time of sentencing." Certainly, a single instance of clarification of a prior felony record does not prove a policy of discretionary disclosure being properly exercised.

We respectfully suggest that this Court has the authority to determine the existence of a routine or "mechanical" policy against disclosure of the presentence investigation report. A request for information from the judges of the Eastern District

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[9] In *Woosley*, Judge Meredith committed himself on record as to his mechanical policy. In the instant case he seems to have purposely avoided any such commitments, and he made no statements at the time of sentencing.

of Missouri, court personnel and probation officers would, we believe, readily prove the policy.

Furthermore, the policy was reflected in *The Pre-Sentence Report: An Empirical Study of Its Use in the Federal Criminal Process*, 58 Georgetown L.J. 451, 484 (1970). Apparently the judges of the Eastern District of Missouri, in response to a survey, acknowledged their policy of non-disclosure. The survey demonstrates the conflict in procedure among the various districts. See also the notes of the Advisory Committee on Rules relating to Rule 32(c)(2). This recognized conflict in procedure strongly suggests that such conflict be resolved by this Court by granting this petition for a writ of certiorari.

Variation in the treatment of reports and divergence of opinion are apparent from numerous authorities which have discussed this issue. We will not unduly lengthen this brief by citations and discussion of the developing authorities supporting full disclosure. Much of this authority is collected in the dissenting opinion of Judge Lay herein. And for an exhaustive discussion of this subject, see *Pennsylvania v. Phelps*, 450 Pa. 597, 301 A. 2d 678 (1973).

Any discussion and definition of procedure under Rule 32 (c)(2) necessarily requires analysis, explanation and correlation of decisions of this Court, including the following: *Townsend v. Burke*, 334 U.S. 736 (1948); *Williams v. New York*, 337 U.S. 241 (1949); *Williams v. Oklahoma*, 358 U.S. 576 (1959); *Gregg v. United States*, 394 U.S. 489 (1969), and *United States v. Tucker*, 404 U.S. 433 (1972). Authority has also suggested that the defendant's right to examine and refute presentence investigation reports is of constitutional magnitude. See Katkin, *Pre-Sentence Reports: An Analysis of Uses, Limitations and Civil Liberties Issues*, 55 Minn. L. Rev. 15 (1970).

The majority opinion of the Court of Appeals recognized that this Court has sought to adopt the modern trend by the

proposed amendment to Rule 32 transmitted to Congress on April 22, 1974. See proposed Rule 32(c)(3), which would make disclosure mandatory except under very limited circumstances. We respectfully suggest that Congressional inaction should not delay the adoption of a rule in conformity with due process requirements. The Committee on Sentencing Practices of the Court of Appeals for the Second Circuit has recommended the new rule (see 14 Cr. L. 2446), and the Seventh Circuit adopted such a rule on April 12, 1974. See *United States v. Miller*, 495 F. 2d 362 (7th Cir. 1974).

We respectfully suggest that full disclosure of presentence investigation reports, except for extraordinary circumstances, should be the uniform rule in all District Courts. Much respectable authority for this position exists, as indicated by Circuit Judge J. Skelly Wright in his dissenting opinion in *United States v. Dockery*, 447 F. 2d 1178, 1186-1187 (D.C. Cir. 1971), cert. den. 404 U.S. 950 (1971):

> "There is now an impressive body of scholarly opinion which challenges the idea that subtle, case-by-case evaluation of requests for disclosure is necessary. I have been particularly impressed by several prestigious studies which have concluded with a recommendation of some measure of *mandatory* disclosure of the presentence report's contents in all cases. Indeed, every recent study has come to that conclusion: the National Council on Crime and Delinquency's Model Sentencing Act, the American Law Institute's Model Penal Code, the American Bar Association's Project on Minimum Standards for Criminal Justice, and the Report of the President's Commission on Law Enforcement and Administration of Justice. Most recent commentary in the law reviews have come to the same conclusion. Such a body of informed, scholarly opinion should cause us all to reexamine our toleration of unstructured discretionary disclosure." (Footnotes omitted.)

Any restrictions on access to the report should be only after the District Court or the government has met its burden to establish the existence of proper causes to deny access to the report in a particular case as, for example, to protect the safety of an informant. Such a burden on the Court is not improper. Compare the requirements on the Court in imposing a more severe sentence after reversal, as set forth in *North Carolina v. Pearce*, 395 U.S. 711 (1969).

The Court of Appeals, after submission of the cause, examined the presentence investigation report. From the opinions below, it seems clear that the report contained unverified, derogatory hearsay information. The majority opinion acknowledged that such information "was not established and is merely an opinion, and would be recognized as such by a sentencing judge." But here Judge Meredith did not indicate the factors he considered in imposing sentence; it is mere speculation to state that he disregarded such unverified information, and in view of the severity of the sentence, it would appear that he did not. As Judge Lay pointed out in dissent, only petitioner could refute the erroneous information. Neither the sentencing court nor the Court of Appeals was in position to do so. As stated in *Alderman v. United States*, 394 U.S. 165, 182 (1969), with reference to in camera inspections by the trial Court:

> "An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances. Unavoidably, this is a matter of judgment, but in our view the task is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court . . ."

The effect of such a harsh sentence as imposed in the instant case can be disastrous to the administration of justice. Consider a defendant with a prior unblemished record who pleads guilty to a first offense of a non-violent nature, who makes full restitution, has an excellent war record, cooperates fully with the authorities, and has available employment and other excellent prospects for rehabilitation; if such a person can be sentenced, without apparent reason except for uncorroborated, derogatory information not made known to him, to a long term of imprisonment without hope of consideration for probation any sooner than the most hardened criminal,[10] then what incentive exists for any other person to enter a plea of guilty or to cooperate with law enforcement authorities or to maintain a respect for the law. Without having access to the reasons, if they exist, for such a sentence, the individual could understandably lose all respect for our system of justice. (Note petitioner's letter of October 12, 1973, in Appendix E.)

Mr. Zumwalt, in his article *The Anarchy of Sentencing in the Federal Courts* in 57 Judicature 96 has said it well, at page 104:

> "Public confidence in the administration of criminal justice is crucial to the smooth functioning of a democracy. Public confidence would reach a crisis stage, were people educated to the hopeless situation facing an unfairly sentenced defendant. Adoption of a system which deals fairly with sentence length could prevent such public loss of faith.
>
> Much has been written recently about the fact that our prisons are failing miserably in their efforts to rehabilitate. As long as a defendant's only direct experience with the law has resulted in unfairness, or when those around him

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[10] Judge Meredith would not even grant relief to petitioner under § 4208(a)—see paragraph 6 of Appendix F.

> have been unjustly sentenced, attempts to rehabilitate him will only be met with contempt."

The reasons for disclosure are fully explained by all of the authorities referred to herein and by Judge Lay in his dissent. The conflict in procedure among the various sentencing courts is glaring. Unless this conflict is resolved, the problems will continue, and without guidelines from this Court, litigation will continue. Appellate courts will be bombarded by unhappy convicts claiming sentences based upon erroneous derogatory information and undisclosed presentence investigation reports. Certainly many appeals could be avoided by a policy of disclosure.

Because of the conflict which exists among the District Courts and within the circuits, and because of the importance of this issue in the administration of justice, including its importance to those administering our penal system, we respectfully suggest that certiorari should be granted as to this Question.

CONCLUSION

For these reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

It would appear that this Court has jurisdiction to modify petitioner's sentence under 28 U.S.C. § 2106, although we doubt that this Court would want to undertake that function. This cause could be remanded to the Court of Appeals for modification of the sentence under § 2106, or to the District Court for further proceedings before a District Judge other than Judge Meredith. Compare *Mawson v. United States*, 463 F. 2d 29, 31 (1st Cir. 1972), and *United States v. Picard*, 464 F. 2d 215, 220 (1st Cir. 1972).

Whether a new sentence is imposed by this Court, the Court of Appeals, or by a District Court, petitioner should be given an opportunity before final sentencing to examine and comment upon the presentence investigation report.

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APPENDIX

APPENDIX A

United States Court of Appeals
for the Eighth Circuit

No. 73-1689

United States of America,
Appellee,

v.

Edward Eugene Dace,
Appellant.

No. 73-1763

United States of America,
Appellee,

v.

Vernon Henry Schneider,
Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: January 16, 1974

Filed: June 10, 1974

Before Lay, Stephenson and Webster, Circuit Judges.
Stephenson, Circuit Judge.

These appeals challenge the consecutive sentences imposed on mail fraud charges, and the refusal of the district court to permit appellants to examine presentence investigation reports. We affirm.

Appellants were charged in a 26-count indictment with devising a fraudulent insurance claim scheme to obtain money from the Hartford Insurance Group and using the mails in execution thereof in violation of Title 18 U.S.C. § 1341.

Appellant Dace pled guilty to three counts out of twenty-four counts in which he was named as a defendant. He was sentenced to five years' imprisonment on each of two counts to run consecutively (total of ten years) and five years' probation to follow. Appellant Schneider pled guilty to three counts out of seven in which he was named defendant and received a like sentence.

After commencing the service of their respective sentences, each of the appellants filed a motion for reduction of sentence which was denied.

Severity of Sentences

Appellants charge that the district court abused its discretion in sentencing defendants to the maximum period of confinement on each of two counts, to be served consecutively, followed by a five-year probation period on a third count.

In *Woosley v. United States*, 478 F.2d 139 (CA8 1973), this court sitting *en banc* reversed a sentence as excessive, stating at 147 as follows:

> We hold that we possess the power to review the severity of a criminal sentence within narrow limits where the court has manifestly or grossly abused its discretion. This is such a case. The severity of the sentence shocks the judicial conscience.[1]

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[1] The majority also held that the district court in following a rigid policy erred in not exercising discretion in imposing the sentence. Three judges dissented, primarily on the basis that the sentence being within statutory limits was not subject to review.

Appellants contend that under the circumstances of this case the sentence itself was a manifest or gross abuse of discretion. They argue that under the current standards consecutive sentences should only be used where it is necessary to protect the public from further criminal conduct by the defendant, and no such showing was here made. *See, American Bar Association Project on Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures, Approved Draft, 1968,* at 171-81. They also point out that their participation in this illegal scheme was minor when compared to that of one Paul Martin who pled guilty to two counts in a similar case and was sentenced to one year imprisonment and a $1,000 fine by the same judge.

We recognize that in the general vernacular the sentences imposed may properly be characterized as heavy. The defendants will be required to serve a minimum of three and a third years before they will be eligible for parole. However, we are not prepared to say that the court has manifestly or grossly abused its discretion.

The government points out in its brief that we deal with a sophisticated and well-planned scheme to defraud the victim company of substantial amounts of money. It involved numerous false claims, including many with which defendants were not charged in the 26-count indictment. They pled guilty to three counts for which they could have been sentenced to fifteen years' imprisonment. There is no question but what the defendants fully understood their maximum exposure in entering their pleas to three counts. Defendant Dace in his motion for reduction of sentence recited that prior to entering his plea the government advised that it would seek permission from the court to withdraw all but one or two counts, but that defendant was advised said permission was not granted and, instead, all counts but three would be dismissed.

The government also points out in its brief that there may have been reasons for the lighter sentence received by Paul

Martin. He cooperated fully with the government from the very beginning and consented to be a witness against all potential defendants in this widespread scheme.

We do not here list the many factors which could properly be considered by the court in fixing sentence. We merely point out that there were many matters to be weighed. Violations of the mail fraud statute cover such a broad range of offenses that comparison of sentences is not particularly helpful.

The record fails to demonstrate a gross abuse of discretion by the trial court in fixing the sentences imposed.

Presentence Investigation Reports

Appellants charge that the district court abused its discretion in refusing to grant them permission to examine their presentence reports prior to sentencing, and in connection with their motions for reduction of sentence. They contend that the court erred in routinely denying access to the presentence reports,[2] and, particularly in this case, where a heavy sentence was imposed. They argue that in view of the severe sentences imposed it is reasonable to conclude that there must have been derogatory information in the presentence investigation reports.

Rule 32(c)(2) of the Federal Rules of Criminal Procedure is permissive in nature. It permits but does not require that all or part of the material contained in the report be disclosed to the defendant or his counsel. We have consistently held that the matter of disclosure is within the discretion of the trial court. *United States v. Schrenzel*, 462 F.2d 765, 775 (CA8 1972) (rehearing en banc denied); *United States v. MacLeod*, 436 F.2d 947, 950 (CA8 1971); *United States v. Gross*, 416 F.2d 1205, 1214 (CA8 1969).

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[2] This was not established.

Proposed amendments to the Federal Rules of Criminal Procedure to take effect July 1, 1974, were transmitted by the Supreme Court to the Congress April 22, 1974. 15 Crim.L. Rep. 3007, April 24, 1974. They require that the court upon request shall permit the defendant or his counsel to read the presentence report and afford comment with respect thereto, or under certain circumstances, in lieu thereof, the court must state orally or in writing a summary of the factual information contained therein relied on in determining sentence and give the defendant or his counsel an opportunity to comment thereon.[3] However, since these amendments have not as yet been adopted we adhere to the discretionary rule still in existence. *Compare, United States v. Thompkins*, 487 F.2d 146, 150 (CA8 1973).

Subsequent to submission of this cause, we directed that this court be furnished copies of the presentence reports. Examination thereof would permit us to determine whether they possibly contained material misinformation or unverified derogatory hearsay which might have influenced the court in imposing sentence. *See, Townsend v. Burke*, 334 U.S. 736 (1947).

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[3] Proposed amendments to Rule 32(c) (3) are in part as follows:

(3) Disclosure.

(A) Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, unless in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if discovered, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c) (3) (A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

The presentence reports describe the pervasive scheme to defraud in which appellants were involved. This description is consistent with the scheme described in the indictment to which appellants pled guilty. The reports do state that "* * * Postal Inspectors have indicated there are many more fraudulent claims in which they feel Dace and Schneider were involved." This, of course, was not established and is merely an opinion, and would be recognized as such by a sentencing judge. However, we do note that the government made the same allegation in its brief filed in this court to which no exception was taken by appellants by way of reply. Similarly, appellant Schneider at the time of sentencing and in his brief before this court points out that he made full restitution on the claims in the counts to which he pled guilty. As previously indicated, postal authorities and the government in its brief believe there are many more fraudulent claims in which appellants were involved. The presentence reports point out that because of the number of people involved in the scheme it is almost impossible to determine the amount of money that appellants actually profited from the scheme. It is stated that the victim company paid out over $50,000 on at least forty known fraudulent claims between December 1967 and July 1971.

The proposed amendments to Rule 32, *Fed. R. Crim. P.*, recognize (and will require if adopted) that it is the better practice to disclose the contents of the presentence report to the defendant or his counsel, or under certain circumstances, in lieu thereof, state the factual information relied on in determining sentence and afford defendant or his counsel an opportunity to comment thereon. Here we must decide only whether the trial court abused its discretion in failing to disclose the reports.

After reviewing the record, we are satisfied that the presentence reports do not contain material misinformation or unverified derogatory hearsay of such a nature that it can be said the

trial court abused its discretion in not revealing the same to appellants before imposing sentence.

Affirmed.

Lay, Circuit Judge, dissenting.

Today we uphold obviously abusive and punitive criminal sanctions. The sentences approved by this court shock the human conscience and by legal standards stun the judicial conscience as well. But perhaps more relevant here, they were imposed illegally.

Disclosure of the Presentence Reports

Without bothering to give any reason for the harsh penalties or to reveal to defendants or their counsel the contents of their presentence reports, the district court imposed five-year maximum sentences, to be served *consecutively*, on these first offenders. There exists no possible reason for such severe punishment other than the district court's reliance on uncorroborated hearsay contained within the presentence reports. The defendants pled guilty to three counts of mail fraud. It is true that the government indicted them on 23 additional counts, but these were dismissed.[1] The presentence reports reveal that the postal inspectors were hampered in their investigation since the insurance company files were lost; nevertheless, the reports state that postal officials "feel" these defendants participated in many more fraudulent claims than they were charged with. This is the rankest sort of hearsay which deserves to fester in the open. If the defendants are to be sentenced for other crimes, the government has the burden of proving them. The defendants cannot

[1] Defendant Schneider was named in only seven counts of the original 26-count indictment.

lawfully be sentenced for crimes not proven. Yet it seems clear, as made manifest by the majority opinion and the presentence reports, that this is what occurred. This illegal procedure places an almost intolerable burden on a defendant. How can the defendants rebut unfounded hearsay, unproven charges, when they are not allowed to see the presentence reports or even to know the judge's reasons for imposing a particular sentence?[2]

This case is no different than *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972), in which the Ninth Circuit vacated the defendant's sentence and remanded for resentencing. On resentencing, the district court was instructed not to "rely upon the information contained in the presentence report unless it is amplified by information such as to be persuasive of the validity of the charges there made." *Id.* at 634. The court summed up the situation as follows:

> In essence, then, what we have is a conviction at a trial providing all of the safeguards required by the Constitution, of an offense warranting, in the opinion of the trial judge, the minimum sentence of five years. This is followed by a determination, based on unsworn evidence detailing otherwise unverified statements of a faceless informer that would not even support a search warrant or an arrest, and without any of the constitutional safeguards, that Weston is probably guilty of additional and far more serious crimes, for which she is then given an additional sentence of fifteen years. *Cf.* Specht v. Patterson, 1967, 386 U.S. 605, 87

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[2] The majority states that examination of the presentence reports by this court is sufficient to insure that no misinformation was relied upon by the trial court. Slip Opinion at 6. I do not feel, however, that this is a viable substitute for disclosure to defendants and their counsel in the first instance. This court is in no better position to assess the accuracy of the reports than the sentencing court. Defendants, still in the dark as to the contents of the report, have never been afforded the opportunity to rebut the charges contained therein. *Cf. Townsend v. Burke*, 334 U.S. 736 (1948).

> S.Ct. 1209, 18 L.Ed2d 326; Kent v. United States, 1966, 383 U.S. 541, 553-554, 86 S.Ct. 1045, 16 L.Ed.2d 84. To us, there is something radically wrong with a system of justice that can produce such a result.

Id. at 630-631.

To say that disclosure of presentence reports lies within the discretion of the district court and that the court's exercise of discretion will not be disturbed except for abuse is one thing; to refuse to require disclosure where abuse has been shown is another. We observed in *United States v. Carden*, 428 F.2d 1116, 1118 (8th Cir. 1970), that the Advisory Committee under Rule 32(c) of the Federal Rules of Criminal Procedure "did not contemplate an absolute rule of nondisclosure without relevancy to the particular circumstance of a case." And we added:

> It is *always* advisable for the trial judge to at least state on the record the various factors he has taken into consideration in rendering his sentence. . . . Such a procedure serves as a checkmate to the danger of misinformation being placed in the hands of the court.

Id. at 1118 (emphasis added).

See also Hess v. United States, No. 74-1022 (8th Cir. May 13, 1974).

Today, the majority chooses to ignore those holdings. Today's holding additionally defies the standards established by the National Advisory Commission on Criminal Justice Standards and Goals, in its *Report on Corrections*, Standard 5.16, as well as the holdings of most of the courts of appeals. *See, e.g., United States v. Espinoza*, 481 F.2d 553 (5th Cir. 1973); *United States v. Brown*, 470 F.2d 285 (2d Cir. 1972); *United States v. Janiec*, 464 F.2d 126 (3rd Cir. 1972); *United States*

v. Picard, 464 F.2d 215 (1st Cir. 1972); *United States v. Miller*, 15 Crim. L. Rep. 2134 (7th Cir. April 12, 1974).

The presentence reports do not rely on any confidential sources which might "dry up" if disclosed. There is no derogatory information about the defendants themselves which might retard their rehabilitation. In sum, there exist no relevant factors here to support nondisclosure of the reports.

Even assuming that nondisclosure were appropriate, if there are justifiable reasons for the sanctions imposed, these reasons should be made known to the defendants and to the reviewing courts. When the district judge is free to impose whatever sentence he chooses, without explanation, this court has no way of knowing whether or not he properly exercised his discretion, or whether he in fact exercised it at all. When the defendants are not provided with an explanation, the likelihood that they will feel they have been unfairly treated is greatly magnified. This only fosters disrespect for the law and certainly cannot assist in the defendants' rehabilitation. *See* M. Frankel, Criminal Sentences 39-49 (1973).[3]

Sentence Review

It must be acknowledged that the scope of federal appellate review of sentencing is still unsettled. Nevertheless, this circuit

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[3] A short statement of reasons relied upon by the district court for the imposition of a particular sentence would go a long way toward curbing abuses of discretion in sentencing:

> The key to limiting abuse of judicial discretion is not to be found in reducing the sentencing judge's options, but rather in providing definitive guidelines to specify what circumstances are aggravating and which mitigating. To leave these terms undefined is to invite their interpretation according to personal bias. Should this approach be adopted, a sentencing judge would be required to ground his decision on something less amorphous than his limitless and unreviewable discretion. Fur-

has recognized the injustice of unreviewed abusive sentences. In *Woosley v. United States*, 478 F.2d 139 (8th Cir. 1973) (en banc), we held that an appellate court had the power to "consider whether the imposition of a maximum sentence was in itself an *abuse* of discretion. . . ." *Id.* at 146. The *Woosley* court further noted that "the record completely fails to justify, nor has the district judge undertaken to explain, the imposition of a maximum penalty. . . ." *Id.* at 147. After reviewing the facts in *Woosley*, the court concluded:

> The broad and unreviewable discretion possessed by federal district courts in matters of sentencing does not extend to the meting out of punishment manifestly disproportionate to the nature of the crime and the character of the criminal.

Id. at 148.

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thermore, the sentencing judge would be forced to incorporate as a part of the record those aggravating and mitigating circumstances upon which he relied in rendering a particular sentence. Without such a provision, personal bias might still prevail.

Zumwalt, *The Anarchy of Sentencing in the Federal Courts*, 57 Judicature 96, 104 (1973).

Similarly, Judge Frankel observes:

> The point, anyhow, is that the parties (especially the loser) are, on deep principles, not merely entitled to a decision; they are entitled to an explanation. And this serves for more than the satisfaction of aesthetic or purely spiritual needs, though I disclaim any belittling of these. The duty to give an account of the decision is to promote thought by the decider, to compel him to cover the relevant points, to help him eschew irrelevancies—and, finally, to make him show that these necessities have been served. The requirement of reasons expressly stated is not a guarantee of fairness. The judge or other official may give good reasons while he acts upon outrageous ones. However, given decision-makers who are both tolerably honest and normally fallible, the requirement of stated reasons is a powerful safeguard against rash and arbitrary decisions.

M. Frankel, Criminal Sentences 40-41 (1973).

Federal courts review the excessiveness of civil damages, when abuse of discretion is shown by judge or jury. It is an anachronism not to afford similar review of sentences in criminal cases.[4]

One of the alleged difficulties of sentence review is the lack of manageable judicial standards. There exists the continued concern that appellate judges will simply substitute their "guess" for that of the trial judge. But the trial judge does not, or at least should not, act out of personal benevolence any more than he should act punitively outside of the law. Discretion lawfully exercised must represent a legal judgment, not a mere human reaction to choice. The same standards which move a trial judge to a particular sentencing decision mark out the boundaries by which lawful exercise of judgment must be measured. To review the exercise of judicial discretion in the sentencing process is not that difficult a task—the appellate process involves similar appraisals in many areas of the law. I suggest the main difficulty in reviewing lawful discretion on appeal comes not in

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[4] The ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences, states in pertinent part:

> Finally, it should be observed that the Advisory Committee has had the benefit of a detailed study of appellate review of sentences in England, where sentence review has been the practice since 1907. The conclusion of that study is worth noting here:
>
> English lawyers and judges find it odd that the question whether sentences should be subject to appellate review is a matter of debate in the United States. The time before which . . . [the Court of Criminal Appeal] was established with the authority to review sentences lies beyond the memory of the active members of the English legal profession today; they have never known another system. So to them sentencing review is taken for granted. In addition, though, everyone consulted believes it to be a good thing. Most think its chief virtue is that it serves as a protection against erratic sentences, the occasional peaks of excessiveness. A number of thoughtful persons also believe that it contributes greatly to sentencing policy and to an improved atmosphere for the sentencing process.
>
> MEADOR REPORT, Appendix C, p. 130, *infra*. One would think that a country which prides itself for its protections against

measuring the exercised judgment against the marked boundaries of the field, but in the all too human predilection of judges to routinely "rubber stamp" the questioned discretion of a district judge without making a qualitative review of the actual decision. It is as erroneous to substitute conclusory agreement as it is to voice opinionated disagreement.

In order to avoid charges that appellate review of sentences "reflects no more than the substitution of one guess about the proper disposition for another," Standard 1.2 of the ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences, establishes general objectives of sentence review:

> The general objectives of sentence review are:
>
> (i) to correct the sentence which is excessive in length, having regard to the nature of the offense, the character of the offender, and the protection of the public interest;
>
> (ii) to facilitate the rehabilitation of the offender by affording him an opportunity to assert grievances he may have regarding his sentence;
>
> (iii) to promote respect for law by correcting abuses of the sentencing power and by increasing the fairness of the sentencing process; and
>
> (iv) to promote the development and application of criteria for sentencing which are both rational and just.

Id. at 21.

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state invasion of liberty would also take pride in providing that protection where it often is needed the most, where the difference to the victim may be counted in years.

Id. at 6.

See also M. Frankel, Criminal Sentences 75-85 (1973); Zumwalt, *The Anarchy of Sentencing in the Federal Courts*, 57 Judicature 96, 104 (1973).

Proper review of the sentences in the present cases would accomplish all four of the above objectives. Although there are no fixed rules to bind the district courts in imposing sentences, *it is apparent that defendants' sentences run counter to all modern guidelines on the proper imposition of sanctions.* The *Report on Corrections* of the National Advisory Commission on Criminal Justice Standards and Goals recommends imprisonment *only* where there is no suitable alternative:

> The traditional sanction imposed for violation of the criminal law in this country was confinement. Any other sentence that in some way moderated the nature or extent of confinement was considered a lenient act on the part of the state. It is more clearly recognized today that confinement is unnecessary and inappropriate in a large number of cases. Supervision in the community has been demonstrated to be at least as effective in insuring future law-abiding conduct without the human degradation, hostility, and public expense associated with confinement. Confinement thus should be considered the alternative to be used when no other disposition will protect the public safety.

Id. at 152.

In its Standard 5.2, on Sentencing the Nondangerous Offender, the National Advisory Commission provides the following guidelines to assist the sentencing court in its decision:

> Criteria should be established for sentencing offenders. Such criteria should include:
>
> 1. A requirement that the least drastic sentencing alternative be imposed that is consistent with public safety. The court should impose the first of the following alternatives that will reasonably protect the public safety:
>
> a. Unconditional release.
>
> b. Conditional release.
>
> c. A fine.

d. Release under supervision in the community.

e. Sentence to a halfway house or other residential facility located in the community.

f. Sentence to partial confinement with liberty to work or participate in training or education during all but leisure time.

g. Total confinement in a correctional facility.

2. A provision against the use of confinement as an appropriate disposition unless affirmative justification is shown on the record. Factors that would justify confinement may include:

a. There is undue risk that the offender will commit another crime if not confined.

b. The offender is in need of correctional services that can be provided effectively only in an institutional setting, and such services are reasonably available.

c. Any other alternative will depreciate the seriousness of the offense.

3. Weighting of the following in favor of withholding a disposition of incarceration:

a. The offender's criminal conduct neither caused nor actually threatened serious harm.

b. The offender did not contemplate or intend that his criminal conduct would cause or threaten serious harm.

c. The offender acted under strong provocation.

d. There were substantial grounds tending to excuse or justify the offender's criminal conduct, though failing to establish defense.

e. The offender had led a law-abiding life for a substantial period of time before commission of the present crime.

f. The offender is likely to respond affirmatively to probationary or other community supervision.

g. The victim of the crime induced or facilitated its commission.

h. The offender has made or will make restitution or reparation to the victim of his crime for the damage or injury which was sustained.

i. The offender's conduct was the result of circumstances unlikely to recur.

j. The character, history, and attitudes of the offender indicate that he is unlikely to commit another crime.

k. Imprisonment of the offender would entail undue hardship to dependents.

l. The offender is elderly or in poor health.

m. The correctional programs within the institutions to which the offender would be sent are inappropriate to his particular needs or would not likely be of benefit to him.

Report on Corrections, supra at 150-151.

The work of the ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures, reflects the same views on sentencing as the *Report* of the National Advisory Commission. Standard 2.2 of the ABA Project provides:

The sentence imposed in each case should call for the minimum amount of custody or confinement which is con-

> sistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.

Id. at 61.

Similarly, Standard 2.3(c) provides that "[a] sentence not involving confinement is to be preferred to a sentence involving partial or total confinement in the absence of affirmative reasons to the contrary." *Id.* at 64.[5]

Both the National Advisory Commission and the ABA Project are also opposed to consecutive sentences, except in the case of dangerous offenders. The *Report* of the National Advisory Commission recommends a presumption "in favor of concurrent sentences for multiple offenses." *Id.* at 166. The *Report* finds little justification for consecutive sentences, other than to extend the period of confinement:

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[5] The Commentary to this Standard explains the presumption in favor of probation:

> The Advisory Committee believes that the starting point for every sentence should be probation or some other sentence not involving commitment or confinement, and that the extent to which commitment or confinement is employed in a given case should turn on the appearance of specific reasons which seem to call for that disposition. See § 2.2, *supra* and §§ 2.4(c) and 2.5(c), *infra*.
>
> . . . . . .
>
> The results tend to support the conclusion that for many judges incarceration is the automatic sentencing response. More harm than good can be caused by such an attitude. Often institutionalization will result in little more than education of the offender in more sophisticated methods of engaging in criminal conduct, and certainly a great deal less than a realistic program of rehabilitation. Particularly in the case of first offenders, there is a much greater chance in most cases of avoiding a subsequent offense by helping the offender adjust to society than by removing him from it. See § 2.1, comment *f*, and § 2.2, comment *a*, *supra*.
>
> In addition to the fact that probation often offers the best possibility of meaningful rehabilitation, it is considerably less expensive than institutionalization. Figures supplied to the

> Such an extension, if based solely on the fact that more than one offense was committed, regardless of the needs of the particular offender or the requirements of public safety, amounts to the imposition of sanction purely for punishment purposes.

Id.

The Report concludes that only dangerous offenders should ever be subjected to more than five years imprisonment.

The ABA Standards Relating to Sentencing Alternatives and Procedures are also generally opposed to consecutive sentences. Standard 3.4(b) holds that "[c]onsecutive sentences are rarely appropriate." *Id.* at 171.

In the Commentary to this Standard, the Advisory Committee states that "[t]he consecutive sentence should be the exception rather than the rule . . . [T]he basis of a consecutive sentence, like the basis of any other sentence which extends for an un-

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Advisory Committee by the Administrative Office of the United States Courts indicate that in fiscal 1964 the per capita cost of probation in the federal system was 59 cents a day, while the cost of housing a prisoner in a federal institution was $6.35 per day. The annual figures were $215 and $2,318, respectively. The Administrative Office reports in addition that probationers during the period in question earned $62 million. Intangible costs in terms of impact on a family deprived of its breadwinner, including possible welfare payments, add to the cost of incarceration, not to mention the cost per inmate of the construction of facilities for housing prisoners. Compare Herlands, *When and How Should a Sentencing Judge Use Probation*, 35 F.R.D. 487, 498 (1964). Crime Commission figures disclose that the average state spends approximately $3400 a year, excluding capital expenditures, to keep a youth in a state training school, while probation for the same period costs approximately one-tenth of that amount. Construction costs are estimated to be in excess of $20,000 per bed in a correctional institution. While the Commission correctly points out that necessary increases are warranted in order to strengthen probation services, the expense of this sanction will still remain considerably below institutionalization. See PRESIDENT'S COMM'N, CORRECTIONS 28, 175-76.

Id. at 72-73.

usually long period, ought to be a finding by the court that the defendant poses such an exceptional risk to the public that long-term incarceration is necessary as a protective measure." *Id.* at 179.

In addition to running counter to modern penological thinking, the sentences imposed by the district court are far in excess of the average sentence for defendants convicted of similar crimes. In 1971 (the most recent year for which data are available), 496 defendants were convicted of mail fraud offenses. Of this total, less than 50% were sentenced to any time in prison. Among those who were incarcerated, the average sentence was 33.2 months. Only 37 defendants out of the total of 496 were sentenced to five or more years. Administrative Office of the United States Courts, Federal Offenders in the United States District Courts: 1971, at 96 (1973).

With these guidelines in mind, examination of the facts in the present cases shows that the sentences imposed were completely unwarranted. The district court chose the most severe sentencing alternative available, yet there are no aggravating circumstances in either case requiring such extreme measures.

Defendant Dace is 46 years old; has been married for 21 years; has three children, ages 15, 11 and 3; and had been employed by the Hartford Insurance Group for ten years. The extent of his past criminal record was a misdemeanor charge in St. Louis County, which resulted in a suspended imposition of sentence. The trial court was advised that Dace has insufficient funds to support his family while confined; that his wife is now working, but cannot afford to keep all three children at home; and that she has been denied welfare assistance. The court was further informed that Dace has employment available to him upon his release from custody. The presentence report shows that Dace cooperated fully with law enforcement authorities during their investigation.

Defendant Schneider is 52 years old; has been married for 27 years; has two children in college; and had been steadily employed. He served his country as a combat pilot in Korea, suffered a disability as a result of such service, and was decorated three times. He also served as a volunteer police officer and has no prior criminal record of any sort. With regard to the three counts to which Schneider pleaded guilty, his counsel pointed out that Schneider had made full restitution to the insurance company.[6] Schneider also cooperated fully with law enforcement officers. Schneider's counsel produced a letter from a Mr. Reeves, offering Schneider employment upon his release from custody, and several other letters of recommendation from various people concerning Schneider's general character.

In summary, Schneider has no prior criminal record at all; Dace has had only one relatively minor scrape with the law. Neither defendant could be considered the least bit dangerous to the public. Their briefs indicate that Dace, after confinement at Leavenworth Penitentiary, was quickly transferred to the minimum security prison camp at Leavenworth, Kansas, and that Schneider has been recommended for the same assignment. Schneider has made at least partial restitution to the insurance company. Neither defendant is likely to benefit from rehabilitative training programs available in prison. These are not unskilled defendants who, if released from custody, might well be forced to commit another crime out of economic necessity. On the contrary, both defendants have jobs available to them immediately upon their release. In the meantime, their confinement is working a severe hardship on their families, who may soon have to look to the state for support.

Keeping Schneider and Dace in prison for an extended period of time is far more likely to have a negative rehabilitative

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[6] Apparently, Schneider even repayed some monies kept by his confederates, in addition to that which he had gained for himself.

effect. By the time they are released, their employment prospects may well have disappeared. They are likely to be so bitter against society that their readjustment into the community will be impossible. I would vacate both sentences, remand to the district court and require that the court disclose the presentence report to each defendant, and that the court thereafter resentence each defendant, taking into consideration time already served. The district court should be directed to consider immediate probation. If some justifiable reason can be demonstrated on the record to deny probation, then the court could require further imprisonment based solely on the charges to which the defendants have pleaded guilty and no others.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

September Term, 1973

No. 73-1773

United States of America,
Appellee,

vs.

Vernon Henry Schneider,
Appellant.

JUDGMENT

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, (sic) in accordance with the majority opinion of this Court this day filed herein.

June 10, 1974

A true copy.

Attest:

/s/ Robert C. Tucker
Clerk, U. S. Court of Appeals, 8th Circuit

APPENDIX C

United States Court of Appeals
For the Eighth Circuit

No. 73-1689

No. 73-1763

United States of America,
Appellee,
v.
Edward Eugene Dace,
Appellant.

United States of America,
Appellee,
v.
Vernon Henry Schneider,
Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

ORDER ON REHEARING

Filed: September 26, 1974

Upon consideration of appellants' petition for rehearing we deem it appropriate to emphasize that where the presentence report is not disclosed to a defendant, "[i]t is *always* advisable for the trial judge to at least state on the record the various factors he has taken into consideration in rendering his sentence. * * * Such a procedure serves as a checkmate to the danger of

misinformation being placed in the hands of the court." *United States v. Carden*, 428 F.2d 1116, 1118 (8th Cir. 1970) (emphasis added). Failure to do so may well require a vacation of sentence and remand for resentencing under the teachings of *Townsend v. Burke*, 334 U.S. 736 (1948); and *United States v. Tucker*, 404 U.S. 443 (1972).

Our refusal to vacate and remand for resentencing in the instant case follows a careful examination of the presentence reports which, as we have noted, do not include unreliable information that a district judge would normally rely on in rendering sentence.

The petition for rehearing is therefore denied.

Judge Lay dissents from the denial of rehearing for all the reasons stated in his original dissent.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX D

United States District Court
Eastern District of Missouri

United States of America, Plaintiff, v. Edward Eugene Dace and Vernon Henry Schneider, Defendants.	No. 73 CR 61(1)

INDICTMENT

(Filed March 14, 1973)

First Count

The Grand Jury charges:

1. That beginning on or about December 31, 1969, and continuing to on or about June 23, 1971, in the City of St. Louis, within the Eastern District of Missouri,

Edward Eugene Dace and
Vernon Henry Schneider,

defendants herein, devised and intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses and representations from the Hartford Insurance Group, well knowing at that time that the pretenses and representations would be and were false and fraudulent when made, and which said scheme and arti-

fice so devised and so intended to be devised by the said defendants was in substance as follows:

2. It was a part of said scheme and artifice to defraud that during the period of said scheme Edward Eugene Dace was employed as a claims supervisor by the Hartford Group. In such capacity Edward Eugene Dace adjusted claims and had the authority to issue drafts for the payment of claims of the Hartford Insurance Group under his own signature.

3. It was a further part of said scheme and artifice to defraud that defendant Vernon Henry Schneider, during the period of said scheme, was employed as a claims representative by the Hartford Insurance Group. In such capacity defendant Schneider adjusted claims and had the power to issue drafts for payment of claims of the Hartford Insurance Group under his own signature.

4. It was a further part of said scheme and artifice to defraud that defendants Edward Eugene Dace and Vernon Henry Schneider would and did adjust fraudulent insurance claims made on the Hartford Insurance Group and cause checks or drafts to issue under their authorized signatures in payment for said false and fraudulent claims. At the time they issued said payments for said false and fraudulent claims they knew that said claims were false and fraudulent.

5. It was a further part of said scheme and artifice to defraud that the defendants Edward Eugene Dace and Vernon Henry Schneider would give to Paul Hugh Martin drafts of the Hartford Insurance Group authorized under their signatures for the payment of fraudulent claims. Paul Hugh Martin would then forge the name of the payee of said draft and cash said draft. Paul Hugh Martin would then write checks to Edward Eugene Dace and Vernon Henry Schneider for their respective share of the proceeds of the fraudulent insurance claim.

6. It was a further part of said scheme and artifice to defraud that Edward Eugene Dace would and did cause drafts of the Hartford Insurance Group to be issued under his authorized signature for fraudulent insurance claims, knowing at the time said drafts were issued that the claims were false. Many of these drafts for payment of fraudulent claims were made payable to acquaintances of Edward Eugene Dace. These payees would then cash the drafts and return the proceeds of the fraudulent claim to Mr. Dace.

7. It was a further part of said scheme and artifice to defraud that Edward Eugene Dace and Vernon Henry Schneider would at times during the scheme exchange monetary funds with each other in order to more evenly split the proceeds that they had received from false and fraudulent insurance claims filed with the Hartford Insurance Group.

8. It was a further part of said scheme and artifice to defraud that defendant Vernon Henry Schneider would and did secure false police reports to substantiate false and fraudulent claims made on the Hartford Insurance Group.

* * * * * * *

Sixth Count

1. The Grand Jury realleges all the allegations of the First Count of this indictment, except those contained in the last two paragraphs thereof.

2. The Grand Jury further charges:

That on or about February 28, 1971, in the City of St. Louis, in the Eastern District of Missouri, Edward Eugene Dace and Vernon Henry Schneider, defendants herein, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, did place or cause to be placed in an au-

thorized depository for mail matter a letter for delivery to the Hartford Insurance Group, Hartford Plaza, Hartford, Connecticut, to be sent and delivered by the United States Postal Service.

In violation of Title 18, United States Code, Section 1341.

* * * * * * *

Twelfth Count

1. The Grand Jury realleges all the allegations of the First Count of this indictment, except those contained in the last two paragraphs thereof.

2. The Grand Jury further charges:

That on or about April 25, 1971, in the City of St. Louis, in the Eastern District of Missouri, Vernon Henry Schneider, defendant herein, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, did place or cause to be placed in an authorized depository for mail matter a letter for delivery to the Hartford Insurance Group, Hartford Plaza, Hartford, Connecticut, to be sent and delivered by the United States Postal Service.

In violation of Title 18, United States Code, Section 1341.

Thirteenth Count

1. The Grand Jury realleges all the allegations of the First Count of this indictment, except those contained in the last two paragraphs thereof.

2. The Grand Jury further charges:

That on or about April 25, 1971, in the City of St. Louis, in the Eastern District of Missouri, Vernon Henry Schneider,

defendant herein, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, did place or cause to be placed in an authorized depository for mail matter a letter for delivery to the Hartford Insurance Group, Hartford Plaza, Hartford, Connecticut, to be sent and delivered by the United States Postal Service.

In violation of Title 18, United States Code, Section 1341.

* * * * * * *

APPENDIX E

October 12, 1973
Leavenworth, Kan.

Dear Mr. Baris,

I want you to submit this letter to the Appellate Court Judges, either immediately, in my brief, re-brief, or wherever it is most appropriate.

Judge Meredith sentenced me to two five years terms, running consecutively and five years probation on the third count, all involving mail fraud. I have been incarcerated in the Federal Prison, Leavenworth, Kansas, since July 7, 1973. Enclosed is a copy of the papers submitted to me on October 9, 1973, by the Warden, concerning my transfer to the local Prison Farm. After I spent 89 days in this maxium security Prison, I was interviewed by the Prison Committee, consisting of eight *professional* counselors. They and the Warden have now agreed to transfer me to a subsidiary, that contains no iron bars, cells, fences, etc., and also placed me on MINIMUM custody. These professionals reviewed my case history and stated that I had received an extremely harsh sentence under the circumstances. This decision, by eight professional men, certainly reflects on my character and also the judgment of Judge Meredith.

Recently, I read an article in the Kansas City, Mo. newspaper, written by Judge John J. Sirica, who ruled on the Watergate defendants. He stated that the sentences imposed on the Watergate defendants last spring, were not intended to be final sentences and that it is *customary* in the Federal Courts, to impose the maximum sentence at the conclusion of the trial or guilty plea by the defendant after 90 to 120 days, such sentences are routinely reduced. He further stated that at the

time of the final sentence, he would consider fairness, compassion, understanding, and justice. I would also like the same consideration, in lieu of the evidence of my pre-conviction character, conduct in recent months and by record of previous sentences in other mail fraud cases. Specifically, Paul Martin's case, also heard by Judge Meredith, whereby he reduced Mr. Martin's sentence to one year.

In my case no one was hurt, no person was placed on terror of his life, full restitution was made prior to my indictment and no apparent damage was done to anyone.

While I served time for the U. S. Government as a Navy Pilot, I was shot *up* by the Japanese and they gave me a second chance; I was shot *down* by the Koreans in the Korean Conflict and they gave me a second chance. Now I ask the United States for a second chance. At present, I feel as if I'm in a holding pattern of Persona-non-Grata.

I respectfully request the Appellate Court Judges to reconsider the obviously harsh sentence imposed by Judge Meredith and reduce it to something in the vicinity of reasonable.

Very truly yours,

/s/ VERNON H. SCHNEIDER 87706-132

United States Department of Justice
United States Penitentiary
Leavenworth, Kansas

In accordance with the authority delegated to me by the Director of the Bureau of Prisons on June 24, 1971, I hereby order the transfer of Schneider, Vernon Henry 87706-132

(name) (number)

from the United States Penitentiary, Leavenworth, Kansas, to the Federal Prison Camp, Leavenworth, Kansas.

(name of institution) (City and State)

Transfer ordered: October 9, 1973.

(date)

/s/ L. E. DAGGETT
Warden

Reason: 290
Institution Classification

Pursuant hereunto, I have this .... day of ....., 19...., executed the above order and committed the prisoner to the institution indicated.

.....
(name)

.....
(title)

LKC-107

APPENDIX F

In the United States District Court, Eastern District of Missouri, Eastern Division

United States of America,
Plaintiff,
vs.
Edward Eugene Dace and Vernon Henry Schneider,
Defendants.

No. 73 Cr. 61(1)
Oral hearing requested

MOTION OF DEFENDANT HENRY SCHNEIDER FOR REDUCTION OF SENTENCE

Now comes defendant Vernon Henry Schneider and, pursuant to the provisions of Rule 35 of the Federal Rules of Criminal Procedure, moves the Court to reduce the sentence heretofore imposed upon him and to grant other relief, and in support of this motion states:

1. On the 14th day of March, 1973, this defendant was indicted on seven counts of mail fraud, in violation of Title 18, United States Code, Section 1341.

2. On the 4th day of May, 1973, this defendant entered a plea of guilty to three counts of the indictment, and the government moved to dismiss the other four counts.

3. On the 17th day of May, 1973, this defendant was sentenced to a term of imprisonment for five years on Count 6, to a term of imprisonment for five years on Count 12 to be served consecutive to the sentence on Count 6, and on Count

13 the sentence was suspended and this defendant was placed on probation for a period of five years to begin upon completion of the sentences of imprisonment for ten years.

4. On the 18th day of June, 1973, this defendant began the service of the sentence imposed and is presently confined at the United States Penitentiary at Leavenworth, Kansas.

5. This defendant requests a reduction in his sentence of imprisonment for the following reasons:

A. The sentence imposed upon this defendant, a first offender, is an unusually long and severe sentence for the offenses to which he pleaded guilty, which were, in effect, part of one continuing transaction.

B. Another person (Paul Martin) involved in the series of transactions out of which this prosecution arose received a sentence of one year imprisonment and a fine.

C. This defendant, prior to his indictment, made full restitution for all money lost by the insurance company in connection with the counts to which he pleaded guilty, even though this defendant actually received less than he repaid the insurance company.

D. The severity of the sentence has caused and will cause an extreme hardship to this defendant's wife, children and elderly mother.

E. This defendant has had an excellent record of cooperation with law enforcement authorities prior to this offense and has fully cooperated with law enforcement authorities since his plea of guilty.

F. Many people have expressed their confidence in and support of this defendant.

G. This defendant assures the Court that he can and will be a law abiding citizen, useful to society, and that he has employment available to him upon his release from custody.

6. In the event this Court is not inclined to release this defendant on probation at this time, this defendant suggests that the Court reduce the length of the sentence and sentence him under the provisions of Title 18, United States Code, Section 4208(a).

7. Prior to sentencing, this defendant had requested an opportunity to examine the pre-sentence investigation report submitted to the Court, pursuant to the provisions of Rule 32(c)(2) of the Federal Rules of Criminal Procedure, but such request was denied; this defendant believes that the severity of his sentence must have been a result of derogatory information in the pre-sentence investigation report, and this defendant requests that he be given an opportunity to examine the pre-sentence investigation report so that he may present explanations to the Court as to any derogatory information contained therein.

NEWMARK and BARIS
/s/ IRL B. BARIS
721 Olive Street
St. Louis, Missouri 63101
621-7400
Attorneys for Defendant

Copy of the foregoing Motion mailed this 22nd day of August, 1973, to United States Attorney, 1114 Market Street, St. Louis, Missouri 63101.

/s/ IRL B. BARIS

APPENDIX G

United States Pacific Fleet, Commander Seventh Fleet
The Commander Seventh Fleet takes pleasure in presenting a GOLD STAR in lieu of the AIR MEDAL, Second Award, to
Lieutenant Vernon H. Schneider
United States Naval Reserve

For services set forth in the following Citation:

For distinguishing himself by meritorious achievement in aerial flight as pilot of an attack bomber in Attack Squadron NINE TWO THREE, attached to the U.S.S. BON HOMME RICHARD, in an attack on hostile North Korean and Chinese Communist forces. On 2 November 1951, Lieutenant Schneider, as a member of a flight composed of six Skyraiders and six corsair aircraft, was assigned to a special strike mission against enemy ordnance production facilities, large concentrations of armed enemy troops and anti-aircraft installations, located in the strongly defended city of PUKCHONG, in Communist held hostile North Korean territory. Lieutenant Schneider successfully made a series of vicious attacks on his specifically assigned mission of destroying these ordnance production facilities and expended his deadly load of bombs with such skillful accuracy that his direct hits aided in completely destroying the primary target. Lieutenant Schneider with his division, then joined the accompanying Corsairs, who had skillfully suppressed the intense anti-aircraft fire from the surrounding positions, and made additional well coordinated, savage attacks in the face of intense small arms fire, against enemy supply and storage facilities which resulted in his flight destroying one large warehouse, severe damage to two others, heavy damage to one locomotive and two strategic rail cuts in the enemy's railroad tracks. By his courage and superb airmanship, Lieutenant Schneider in-

flicted severe and complete damage upon the enemy's highly important and desperately needed storage and production facilities, rail and communications installations. His devotion to duty was at all times in keeping with the highest traditions of the United States Naval Service.

/s/ H. M. MARTIN
H. M. MARTIN
Vice Admiral, U.S. Navy
Commander Seventh Fleet

Temporary Citation

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-471

VERNON HENRY SCHNEIDER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-5608

EDWARD EUGENE DACE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the consecutive sentences imposed upon them on mail fraud charges should be reduced and that the district court abused its discretion in refusing to reveal the contents of the presentence report to defense counsel.

In an indictment returned in the United States District Court for the Eastern District of Missouri, petitioners were charged with mail fraud in violation of 18 U.S.C. 1341. Petitioner Schneider was named as a defendant in seven of the 26 counts, and petitioner Dace was named in 24 counts. The indictment charged that petitioner Schneider, a claims representative, and petitioner Dace, a claims supervisor of the Hartford Insurance Group, devised a scheme to defraud their employer by adjusting fraudulent insurance claims and causing checks to be issued in payment of these claims and that, as part of this scheme, Schneider secured false police reports to substantiate the false claims (Pet. App. A25-A27).

Each petitioner pleaded guilty to three counts, and the remaining counts were dismissed. Prior to sentencing, petitioners requested permission to examine their presentence investigation report, which the district court refused to grant. On May 17, 1973, the court sentenced each petitioner to two consecutive terms of five years' imprisonment followed by five years' probation on the third count.

Thereafter petitioners moved for a reduction of sentence under Fed. R. Crim. P. 35. Following a hearing, the motions were denied by the district court. A divided panel of the court of appeals affirmed. The majority, following the Eighth Circuit's *en banc* decision in *Woosley* v. *United States,* 478 F.2d 139, reviewed the sentences to determine whether they constituted a manifest or gross abuse of discretion (Pet. App. A2-A4). It also examined the presentence investigation reports and concluded that it was "satisfied that the presentence reports do not contain material misinformation or unverified derogatory hearsay of such a nature that it can be said the trial court abused its discretion in not revealing" the report before imposing sentence (Pet. App. A4-A7).[1]

[1]The dissent stated that there "exists no possible reason for such severe punishment other than the district court's reliance on uncorroborated hearsay contained within the presentence reports," noting

1. It is well established that the district court has wide discretion to determine the appropriate sentence to be imposed. *United States* v. *Tucker*, 404 U.S. 443, 446-447. When the sentence imposed is within the statutory limits, as in the instant case, it is generally not subject to review. *United States* v. *Tucker, supra; Gore* v. *United States*, 357 U.S. 386, 393; *United States* v. *Grene*, 455 F.2d 376, 377 (C.A. 5), certiorari denied, 409 U.S. 856.

To support their contention that the sentences imposed were so excessive as to constitute an abuse of discretion and cruel and unusual punishment in violation of the Eighth Amendment, petitioners point to their records of good behavior and the fact that more lenient sentences have been imposed in other mail fraud cases. Petitioners' histories were, however, made known to the district court before sentencing (Tr. 8-9). The district court was also provided with a presentence investigation report. The district court therefore possessed the information necessary to determine the appropriate sentences. Although petitioners had no prior criminal record (other than a prior misdemeanor in the case of Dace), they were involved in a sophisticated and well executed scheme to defraud the Hartford Insurance Group of substantial amounts of money, which scheme involved at least forty fraudulent claims. Given these circumstances, it was within the court's discretion to conclude that petitioners' conduct merited severe sentences. See, *e.g., United States* v. *Smallwood*, 443 F.2d 535 (C.A. 8), certiorari denied, 404 U.S. 853; *Mitchell* v. *United States*, 142 F.2d 480 (C.A. 10), certiorari denied, 323 U.S. 747; *Becker* v. *United States*, 91 F.2d 550 (C.A. 9).

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particularly a statement within the presentence report that postal inspectors "feel" that these defendants participated in many more fraudulent claims (Pet. App. A7). The dissent also would have directed the district court to consider immediate probation (Pet. App. A21).

2. As to petitioners' contentions that the district court should have revealed the contents of the presentence report, Rule 32(c) explicitly places the decision whether to disclose the contents of the presentence report to defense counsel within the sound discretion of the trial court. *Gregg* v. *United States,* 394 U.S. 489, 492; *United States* v. *Schrenzel,* 462 F.2d 765, 775 (C.A. 8), certiorari denied, 409 U.S. 984. The court below determined that the presentence report did not include material misinformation or unverified derogatory hearsay that influenced the district court in imposing the sentence (Pet. App. A5-A6). On the contrary, the presentence report stated that the victim company had paid out over $50,000 on at least forty fraudulent claims between December 1967 and July 1971 presented by petitioners—a description which is consistent with the scheme described in the indictment, to three counts of which petitioners pleaded guilty. In these circumstances, therefore, the district court did not abuse its discretion by withholding the reports.

Petitioners in effect urge a change in the rules making it routine practice to turn presentence reports over to the defendant. Indeed, the recently proposed amendments to the Rules of Criminal Procedure transmitted to Congress on April 22, 1974, would, in proposed Rule 32(c)(3), make disclosure of the presentence report to the defendant mandatory upon request except in a few well-defined circumstances. But those amendments have not yet been approved.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.